

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SROUR v MINISTER FOR IMMIGRATION

[2005] FMCA 1616

MIGRATION – Review of Migration Review Tribunal decision – refusal of a Partner (Migrant) (Class BC) visa – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.354, 357, 360, 395A, 474, 483A

Judiciary Act 1903 (Cth), s.39B

Migration Regulations 1994 (Cth), reg.1.15A, 1.20J

Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2

Re Minister for Immigration & Multicultural Affairs; Ex parte Applicants

S134/2002 [2003] HCA 1

Craig v South Australia (1995) 184 CLR 163

Dranichnikov v Minister for Immigration & Multicultural Affairs [2003] HCA 26

1. *VNAA v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1474

NAWJ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 54

Minister for Immigration & Multicultural & Indigenous Affairs v Sun [2005] FCAFC 201

Applicant: OSSAMA MOHAMAD SROUR

Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

File No: SYG 3028 of 2004

Delivered on: 22 November 2005

Delivered at: Sydney

Hearing date: 28 September 2005

Judgment of: Lloyd-Jones FM

REPRESENTATION

Solicitor for the Applicant: Mr M Newman of Newman & Associates

Solicitor for the Respondent: Ms A Alex of Phillips Fox

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ORDERS

- (1) The application is dismissed.
- (2) The applicant is to pay the respondent's costs and disbursements of and incidental to the application.
- (3)

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 3028 of 2004

2. OSSAMA MOHAMAD SROUR

Applicant

And

3. MINISTER FOR IMMIGRATION &

4. MULTICULTURAL & INDIGENOUS AFFAIRS

Respondent

REASONS FOR JUDGMENT

The proceedings

4. These proceedings were commenced by an application under s.39B of the *Judiciary Act 1903* (Cth), invoking s.483A of the *Migration Act 1958* (Cth) (“the Act”), filed in the Sydney Registry of the Federal Magistrates Court of Australia on 7 October 2004 for a judicial review of the decision of the Migration Review Tribunal (“the Tribunal”) made on 3 September 2004, affirming the decision of the delegate of the respondent (“the delegate”) made on 23 April 2003 to refuse to grant the applicant a Partner (Migrant) (Class BC) visa. The applicant seeks relief in the form of constitutional writs against the decision of the Tribunal.

Background

5. Mr Ossama Mohamad Srou, the applicant, a national of Lebanon, born on 18 September 1975, applied for permanent residence on spousal

grounds on 7 September 2000. The visa application form completed by the applicant incorporated an application for a permanent visa, a Partner (Migrant) (Class BC) visa, which normally cannot be granted until two years have elapsed since the lodgement of the application and an application for a temporary Partner (Provisional) (Class UF) visa, which can be granted immediately, to permit stay until a decision is made on the permanent visa (Court Book pp.1-50) (“CB”). This process is intended to test whether the relationship is continuing two years after the visa application, before permanent residence is confirmed. The delegate’s decision to refuse to grant a Partner (Migrant) (Class BC) visa was made on 23 April 2003 (CB pp.66-70). The applicant lodged a valid application for a review of the delegate’s decision with the Tribunal on 26 May 2003 (CB pp.73-78). The original visa application was a combined application for a subclass 309 Spouse (Provisional) and subclass 100 (Spouse) permanent visa. The applicant was granted a subclass 309 visa on 6 December 2000 (CB p.141).

6. The applicant entered Australia on a subclass 309 visa on 31 December 2000. The applicant’s subclass 309 visa ceased to be in effect on 31 December 2002 and since then the applicant has held a bridging visa that was granted on the basis of an application subject to a review by the Tribunal. The applicant was nominated in connection with the visa application by Mrs Fatima Mustapha (“the nominator”), an Australian citizen who was born in Kogarah, New South Wales, Australia on 2 August 1981.
7. The applicant claimed to have met the nominator for the first time in July 2000 when she visited his sister Zahra, who is married to the nominator’s second cousin. The applicant claimed that whenever the nominator would visit his sister in Yaroun, a village near to where he lived, he would see the nominator and over time they became friends. After getting to know one another, the applicant and the nominator were married on 13 August 2000. The wedding was held at the nominator’s uncle’s house and after the wedding she went to live in the applicant’s village, Aitha. The applicant and the nominator were assessed as being in a spousal relationship as provided under regulation 1.15A of the *Migration Regulations 1994* (Cth) and a subclass 309

Partner (Provisional) (Class UF) visa was granted on 6 December 2000 (CB p.142).

8. The circumstances leading to the cancellation of the provisional visa and the subsequent application for review of that decision, was effectively summarised in the written submissions of the respondent, prepared by Ms A Alex and I adopt paragraphs 2.1-2.6 and 3 for the purpose of this judgment:

On 15 May 2001, the applicant submitted a change of address form to DIMIA giving his new address in Arncliffe (CB p.59). On 20 June 2002, DIMIA wrote to the applicant care of the Arncliffe address advising him that as it was approximately 2 years since he lodged his application with DIMIA, he needed to provide further information for an assessment (CB p.61). No response was received.

On 15 January 2003, the nominator telephoned DIMIA to provide her current address and telephone number. She gave a different address in Arncliffe. On 15 January 2003, DIMIA wrote to the applicant care of the nominator's address requesting that he provide information to demonstrate that he and the nominator were still in a genuine and continuing relationship (CB p.64). No response was received.

On 10 April 2003, the nominator contacted DIMIA by telephone to advise that she and the applicant were no longer in a relationship and she had taken out an apprehended violence order (AVO) against him.

On 23 April 2003 DIMIA sent 2 copies of the same letter to both Arncliffe addresses (CB p.66) stating that the subclass 100 partner visa was refused because the applicant had failed to provide documentation supporting his claim that he and the nominator were in a genuine and continuing relationship.

On 7 May 2003, DIMIA received a letter from the nominator advising that she and the applicant had reconciled, were living together and had a 14 month old baby. She stated she wanted to continue with the visa application. She also confirmed their address (CB p.71).

On 12 May 2003, DIMIA wrote to the applicant acknowledging the letter from the nominator and advising that the application could no longer be considered. It advised that he could apply to the MRT for review (CB p.72).

On 26 May 2003, the applicant lodged an application for review to the MRT (CB p.73).

On 22 April 2004, the MRT wrote to the applicant inviting him to comment on information that would be a reason for affirming the decision. This information was that the nominator had taken out an AVO against him and was no longer in a relationship with him (CB p.114).

On 27 April 2004, the applicant responded by stating that he and the nominator had resolved their differences, the nominator had forgiven him and they were living together in the address in Arncliffe that the nominator had provided (CB p.116).

On 28 April 2004, the MRT wrote to the applicant, inviting him to a hearing (CB p.117). A response to the hearing invitation dated 3 May 2004 was received (CB p.120). However, this was only signed by the nominator.

On 12 May 2004, the nominator advised the MRT in writing that she was withdrawing her sponsorship and she and her daughter had moved to a different address in Arncliffe (CB p.123).

At the scheduled time of the hearing on 27 May 2004, the nominator advised that the applicant did not know of the hearing because she did not tell him. She stated that although she is still living with the applicant, he did not deserve to have a visa granted as he was not supporting her financially. She asked if the decision could be sent to a different address. The MRT advised that as she had withdrawn her sponsorship she no longer had standing so it could not accept a change of address from her (CB p.124).

On 3 and 4 June 2004, the MRT wrote to the applicant care of both addresses at Arncliffe previously provided, inviting him to comment on information that would be a reason for affirming the decision. That information was that the nominator had withdrawn her sponsorship. It also invited him to provide information concerning his daughter and his own custody or access, if any, of her (CB pp.127, 130). No response was received.

The Tribunal's findings and reasons

9. A convenient summary of the Tribunal's reasons were contained in the respondent's written submissions prepared by Ms Alex and I adopt paragraphs 4-6 for the purpose of this judgment:

The MRT was not satisfied that there was any joint ownership of assets, any joint liabilities or any pooling of financial resources between the applicant and the nominator (CB p.145).

The MRT was not satisfied that the nominator and the applicant were living together (CB p.145).

The MRT found that the applicant and nominator were not in a genuine and continuing relationship because there was no evidence of this. The MRT concluded that the applicant was not the spouse of the nominator (CB p.145). The MRT found that the applicant did not meet any other requirements for the grant of the visa (death of spouse, domestic violence or custody/order/obligation in relation to a child) because no evidence was provided in respect of those requirements (CB pp.145-146).

Application for review of the Tribunal's decision

10. On 7 October 2004 the applicant filed an application for review under s.39B of the *Judiciary Act 1903* (Cth) setting out the following grounds:

1. *Failing to hold the hearing to which it had invited the unrepresented applicant.*
2. *Taking what it claimed to be evidence from an unsworn hearsay account of a conversation between a counter staff member and the nominator.*
3. *Failing to put the further allegations contained in the said unsworn hearsay account of a conversation between a counter staff member and the nominator to the unrepresented applicant.*
4. *Failing to allow the unrepresented applicant the opportunity to respond.*
5. *Founding its decision partly or wholly upon the said unsworn hearsay account of a conversation between a counter staff member and the nominator.*

The law

11. The present application is affected by the privative clause contained in s.474 of the Act. The High Court in *Plaintiff S157/2002 v Commonwealth of Australia* (“*Plaintiff S157/2002*”) and *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002* (“*Applicant S134/2002*”), held in broad terms that the privative clause does not protect Tribunal decisions that are

affected by jurisdictional error or bad faith: *Plaintiff S157/2002* at [76] and *Applicant S134/2002* at [15].

12. An administrative tribunal exceeds its powers and thus commits a jurisdictional error if it identifies a wrong issue, asks a wrong question, ignores relevant material, relies on irrelevant material or, in some circumstances, makes an erroneous finding or reaches a mistake and conclusion in the way that affects the exercise or purported exercise of the Tribunal's power: *Craig v South Australia* per McHugh, Gummow and Hayne JJ at [179] and *Dranichnikov v Minister for Immigration and Multicultural Affairs*.

Regulations

13. The Act and the various Regulations made under that Act, principally the *Migration Regulations 1994* (Cth) ("the Regulations") provide for different classes of visas, and the criteria for the grant of visas. The relevant Regulations are:
 - a) Regulation 1.15A
 - b) Regulation 1.20J
 - c) Part 100 of Schedule 2

Reasons

14. The respondent submitted that the applicant was properly invited to attend a hearing of the Tribunal by a letter sent to his last known address at that time. The relevant sequence of documents commenced with the Tribunal's letter addressed to the applicant dated 22 April 2004 (CB pp.114-115) which stated:

You are invited to comment, in writing, on the following information:

- *Information on the Department's file suggest that:*
 - 1) *An apprehended Violence Order was taken against you by your nominator [the applicant's wife].*
 - 2) *You are no longer in a relationship with your nominator.*

15. That invitation was responded to by a letter from the applicant dated 24 April 2004 and received by the Tribunal on 27 April 2004. That letter stated that the applicant and his wife had resolved their differences, were in a continuing relationship and confirmed their residential address (CB p.116). The Tribunal then issued an invitation to appear before it dated 28 April 2004 to the confirmed residential address, inviting the applicant and his nominator (wife) to a hearing scheduled for 27 May 2004 (CB pp.117-118). Included in that invitation was a request to confirm whether the applicant wished to appear before the Tribunal by completing and returning the attached “Request for Hearing” form. The “Request for Hearing” form was completed and signed by the nominator on behalf of the applicant on 7 May 2004 and returned to the Tribunal (CB pp.119-120). The “Request for Hearing” form indicated that the applicant requested the Tribunal to take oral evidence from the nominator together with any written evidence or material.

16. The Tribunal, in its “Findings and Reasons”, acknowledged the difficulty the applicant may have faced in complying with the Tribunal’s request. The Tribunal noted:

“The Tribunal invited the visa applicant, in a letter dated 3 June 2004, to provide information such as a certified copy of his daughter’s birth certificate, advice about any custody or joint custody or access arrangements or advice about any obligation that the visa applicant might have under a child maintenance order. However the visa applicant has not responded to this letter. The Tribunal noted the visa applicant’s lack of English. It may be that he has not received some of the correspondence from the Department and the Tribunal, because the nominator has not passed the mail to him and no-one has translated the correspondence. The nominator told the Tribunal that she did not tell the visa applicant about the hearing date.” (CB p.145)

17. However, the Tribunal considered that the lack of evidence provided by the applicant (despite acknowledging that request for such information may never have reached the applicant), was a satisfactory reason to affirm the decision of the delegate. The Tribunal explained its reasons by stating the applicant was aware his visa would expire after two years, his application was under review and had an onus to follow up

his application and provide supporting documents. In its decision, under the heading “Findings and Reasons”, the Tribunal continued:

“However the visa applicant would be aware that his previous visa was only granted for 2 years and has now expired. The Tribunal also received a letter on 27 April 2004 signed in the visa applicant’s name, which was a response to the Tribunal’s letter of 22 April 2004. The visa applicant’s response would suggest that he was aware that his visa application was under review. The Tribunal is of the opinion that in the circumstances there is some considerable onus on the visa applicant to follow up his visa application and to provide supporting documentation.” (CB p.145)

18. The fact that the applicant did not become aware of the invitation to the Tribunal hearing does not displace the conclusion mandated by Part 7, Division 7A that the invitation was duly given to him: *VNAA v Minister for Immigration & Multicultural & Indigenous Affairs* per Ryan J at [15]:

“Subsection 441A therefore clearly contemplates that both an invitation and a notice under s 424A if in writing and sent by prepaid post are taken to have been given to the applicant if sent to his or her last address for service or last residential address. In this case the invitation and the notice of the time and place of the hearing were both embodied in the one document. They were sent to both the applicants’ address for service and their last residential address provided on their application for review. Accordingly, since the invitation is taken to have been duly given to the applicants, it follows that they were invited to appear as required by s 425(1). Their failure to appear allowed the Tribunal under s 426A(1) to make a decision on their application in their absence. The fact that the applicants never became aware of the invitation does not displace the conclusion mandated by s 441C that it was duly given to them.”

19. The nominator (applicant’s wife) advised the Tribunal by letter dated 11 May 2004, received by the Tribunal on 12 May 2004, she was withdrawing her sponsorship, indicated the reasons for the breakdown in the relationship with the applicant and advised she had relocated to a different address in Arncliffe with her daughter (CB p.123). On the date of the nominated Tribunal hearing, 27 May 2004, the nominator attended the Tribunal without her husband (the applicant). Details of a conversation between a Tribunal employee and the nominator are

recorded in a Tribunal minute and signed by Micaela Callan (CB pp.124-126). During that conversation, the nominator informed the Tribunal employee that the applicant did not know about the hearing because she had not told him. As a result of the receipt of this information, the Tribunal wrote to the applicant on 3 June 2004 inviting him to comment on the information provided by the nominator to the Tribunal employee (CB pp.127-129). On 4 June 2004 the Tribunal forwarded the same letter to the applicant at the other address it held (CB pp.130-132). None of these letters were returned unclaimed to the Tribunal nor did the applicant respond to the letters. The letter was sent as a s.395A letter to both addresses in Arncliffe. This letter was sufficient to satisfy the provisions of s.360 under the Act: *NAWJ v Minister for Immigration & Multicultural & Indigenous Affairs* per Sackville J at [30]-[31]:

“I am satisfied that the letter of 15 July 2003, inviting the applicant to provide additional information, was dispatched on the date it bears and was sent by prepaid post to the last address for service provided by the applicant in connection with the review. It follows that the invitation was given in accordance with the procedure laid down in s 441A(4) of the Migration Act. The invitation is therefore deemed to have been received seven working days after its dispatch – that is, on 24 July 2003 (s 441C(4)) . If it matters, I am satisfied on the balance of probabilities that the applicant actually received the letter no later than 24 July 2003.

Since the applicant did not provide the additional information within the time specified (or at all), the RRT was not obliged to invite the applicant to appear before it to give evidence and present arguments in relation to the decision under review (ss 424C(1), 425(1), 2(c)). Moreover, the applicant was not entitled to appear before the RRT (s 425(3)). Thus the RRT was entitled to decide the application on the documentation before it without giving the applicant an opportunity to appear.”

20. When the Tribunal became aware of the applicant’s change of circumstances, the Tribunal fulfilled its obligation by issuing a second notice requesting an explanation and information about that change in circumstances: *Minister for Immigration & Multicultural & Indigenous Affairs v Sun* per Marshall, Mansfield and Siopis JJ at [49]:

“Indeed, the Tribunal may be obliged to give two or more notices under s 359A of the Act. It is not uncommon for information which would be the reason or part of the reason for affirming the decision under review to emerge at different times, and from different sources. The circumstances addressed by the High Court in SAAP (in respect of the similar provisions of the Act as they apply to the Refugee Review Tribunal) provide an illustration. The need to give a second or subsequent notice under s 359A would not however remove from a visa applicant the status of being a person to whom s 359C(2) applies, if the visa applicant had failed to respond to an earlier notice under s 359A or had done so outside the prescribed time.”

21. The Tribunal’s decision ultimately turned on the fact that it could not be satisfied that the applicant and nominator were living together or they had a mutual commitment to a genuine and continuing relationship. The Tribunal found:

“The Tribunal is not satisfied that at the time of decision the visa applicant is still the spouse of the sponsoring spouse as defined in Regulation 1.15A. The Tribunal therefore finds that the visa applicant fails to satisfy the requirements of subclause 100.221(2). There is no evidence that the sponsoring spouse has died. Therefore the visa applicant does not satisfy subclause 100.221(3) at the time of the decision.” (CB p.145)

22. The Tribunal also noted that there were no submissions or evidence before the Tribunal of domestic violence or that the applicant had custody or joint custody of the couple’s child (CB pp.145-146).
23. The solicitor for the applicant alleged that there was a breach of natural justice in this matter. Mr Newman for the applicant argued that the evidence of that denial was contained in the minute recorded by Micaela Callan dated 27 May 2004 (CB pp.124-126) being the date of the scheduled Tribunal hearing. Mr Newman argued that Ms Callan’s position was not identified but she was clearly not the presiding member allocated to this matter. He argued Ms Callan was exercising power in a possible breach of ss.354 and 357 of the Act. The first point that was challenged was a statement in respect of standing:

“I explained to the wife that she no longer has standing in this case and cannot appear for the [visa applicant].” (CB p.124)

24. Mr Newman did not submit any evidence in support of his contention that the nominator (applicant's wife) was still the legitimate representative of the applicant. The material before the Court was the letter from the applicant dated 24 April 2004 indicating there had been reconciliation between the parties, that the issue in respect of the Apprehended Violence Order had been resolved, that the applicant and the nominator remained in a relationship and they both lived at the same residence in Arncliffe (CB p.116). The "Request for Hearing" form indicated that the applicant requested the Tribunal take oral evidence from the nominator but that form was signed by the nominator (CB pp.119-120). Finally, the letter dated 11 May 2004 received by the Tribunal on 12 May 2004 (CB p.123) indicated that the nominator had withdrawn her sponsorship and that she and her daughter were residing at a different address in Arncliffe from that of the applicant. The nominator admitted to Ms Callan that she had not informed the applicant about the hearing. It remains unclear as to what information the applicant had received and whether it was his election for the wife to appear at the hearing and represent him. From the documents contained in the Court Book there is a strong possibility that the applicant was completely unaware of any of these activities and whether his interests were being represented. Mr Newman had a number of avenues available to him to rectify this problem but has elected not to submit any evidence in this respect.
25. Mr Newman also challenged the content of the minute forwarded to the presiding member by Orlando V Morales dated 20 July 2004 (CB p.133) reporting on the letters forwarded to the applicant dated 3 June 2004 and 4 June 2004. The challenge was to the comment accorded by the presiding member that the applicant did not attend the scheduled hearing on 27 May 2004. It was argued by Mr Newman that the applicant was represented by the nominator who had attended but was denied the opportunity to appear. In the absence of any evidence or testimony from the applicant this argument fails because there is nothing to indicate that it was the applicant's intention that he still be represented by his wife in the circumstances that she has formally withdrawn her sponsorship and indicated that the matrimonial relationship had broken down.

26. Mr Newman also challenged the contents of paragraph 26 of the Tribunal's decision (CB p.144) as being patently untrue:

“The Tribunal set down a hearing for 27 May 2004. On 12 May 2004 the nominator advised in writing that she was withdrawing her sponsorship of the visa applicant and she and her daughter have moved to a different address in Arncliffe. On 27 May 2004 the nominator advised the Tribunal in person that the visa applicant does not know about the hearing as she has not told him. Although she is still living with the visa applicant the review applicant said that he did not deserve to have a visa granted as he is not supporting her financially. The nominator also asked if the Tribunal would take into account that the visa applicant and the nominator have a daughter and she asked if the decision could be sent to a different address. The Tribunal advised the nominator that her verbal advice might be taken into account but she no longer has standing in relation to the visa applicant's application as she has withdrawn her sponsorship and so the Tribunal could not accept a change of address from her.” (CB p.144)

27. The argument was that the applicant did not attend the hearing but was, in fact, represented by the nominator but she did not get passed the front desk of the Tribunal's office and this decision to shut her out was made by a Tribunal employee of unidentified status and not the Tribunal member. I do not believe this introduced any new issue other than the issue of standing of the nominator. The nominator had informed the Tribunal on 11 May 2004 that she withdrew her sponsorship and the Tribunal had adopted the position that the nominator no longer represented the interests of the applicant. There was no documentation contained within the Court Book which indicated who made the decision in respect of the nominator's standing. However, the contents of paragraph 26 of the Tribunal's decision suggested it was not necessarily a decision of the Tribunal employee, Ms Callan, in isolation or without authority as the Tribunal member in her decision indicated that the issue of standing and the status of the child were part of the decision record.
28. Mr Newman also challenged the content of paragraph 31 of the Tribunal's decision and in particular the following statement:

“At the time of the decision the visa applicant has not provided any evidence that he and the nominator are still in a genuine and continuing relationship.” (CB p.145)

29. The contention was, contrary to that statement of the Tribunal, that evidence of the couple’s cohabitation was available to the Tribunal on the very morning of the hearing but that evidence had been excluded by the Tribunal’s clerical staff. I cannot accept that proposition as the details contained in the Tribunal’s decision are derived from a clearly articulated minute recorded by Ms Callan and conveyed to the Tribunal member. That information was also contrary to the letter sent by the nominator and received by the Tribunal on 12 May 2004 which indicated there was a break down in the relationship and that the nominator and her daughter were residing in premises other than those occupied by the applicant. The nature of this information was contradictory and implausible given the information that resulted from the conversation between the nominator and Ms Callan, namely that the nominator had withdrawn her sponsorship of the applicant.
30. The documents filed in these proceedings indicated that the applicant had been represented by Newman & Associates from the date of the original filing and the applicant had been represented by that firm for the duration of these proceedings. However, there has been no attempt to file any affidavit material or call the applicant to give evidence to support the contentions made by his solicitors during this hearing. A number of the arguments submitted on behalf of the applicant could only be successful if evidence was presented that clearly contradicted the inferences that have been drawn on the documentation filed with the Tribunal. I am not satisfied that any of the contentions submitted on behalf of the applicant by his solicitor established the Tribunal committed jurisdictional error in the exercise of its duties.

Conclusion

31. I am not satisfied that any of the grounds or supporting arguments enables me to identify any jurisdictional error committed by the Tribunal. The applicant’s claim should be dismissed.

32. I am satisfied that an order for costs should be made in this matter.
I order the applicant to pay the respondent's costs and disbursements of
and incidental to the application.

**I certify that the preceding twenty-nine (29) paragraphs are a true copy of
the reasons for judgment of Lloyd-Jones FM.**

Associate: Menna McMullan

Date: 22 November 2005